

147212



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W.R. Moore, Brokerage

File: B-245729.4

Date: July 27, 1992

William R. Moore for the protester,
Michael D. Weaver, Esq., Department of Housing and Urban
Development, for the agency,
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Contention that contracting agency improperly failed to release information concerning other offers received under request for proposals is without merit since during negotiated procurement the procuring agency is not permitted to provide information to an offeror concerning the names of other offerors or the details of other offers.
2. Protest that awardee is not capable of performing contract concerns the contracting agency's affirmative determination that the awardee is a responsible firm, a determination which the General Accounting Office will not review where there is no showing of fraud, bad faith, or misapplication of a definitive responsibility criterion.
3. Protest that procuring agency was biased in favor of the awardee is denied where the protest is based solely on inference and unsupported allegations.
4. Protest that cost should have been the determining factor in the award decision under a negotiated procurement is dismissed as untimely when not filed before the closing time for the receipt of proposals.
5. Protest that the procuring agency improperly awarded contract to a higher priced offeror is denied where the solicitation provided that technical factors were more important than price and the agency reasonably determined that the awardee's superior technical proposal was worth the additional cost.
6. Protest that offers were not properly secured between the time they were received and evaluated is denied where the agency provides affidavits from the contracting officer

and his assistant that the proposals were locked up after they were received and the protester fails to provide an affidavit to dispute the agency's position.

DECISION

W.R. Moore, Brokerage protests the award of a contract to Saulsberry Real Estate under request for proposals (RFP) No. 39-91-117, issued by the Department of Housing and Urban Development (HUD) for real estate asset management services. Moore essentially complains that the agency did not follow applicable procedures in conducting the procurement. Moore also argues that HUD was biased in favor of the awardee.

We deny the protest in part and dismiss it in part.

The RFP was issued on May 15, 1991, for real estate management of properties owned by or in control of HUD in the Oklahoma City Metroplex area. The solicitation listed the services the successful contractor would have to perform. The solicitation advised offerors that the evaluation would be based upon the completeness and thoroughness of the proposals submitted. The contract was to be awarded to the responsible offeror whose offer conformed to the solicitation and was most advantageous to the government. The solicitation also advised offerors that technical factors were worth more in the award decision than price and that the award could be made to other than the lowest priced offeror.

Fifteen offerors responded to the solicitation by July 9, 1991, the closing date for the receipt of proposals. A technical evaluation board reviewed the proposals and submitted a report to the contracting officer which contained a score for each offeror and a recommendation concerning which offers should be included in the competitive range. After reviewing the report, the contracting officer established a competitive range of seven offers, including the protester's. HUD subsequently held discussions with each competitive range offeror and requested each to submit a best and final offer (BAFO) by September 16. After the BAFOs were received and evaluated, HUD performed a cost/ technical tradeoff among the three lowest priced proposals to determine the awardee. Of these three, Moore submitted the lowest price (\$1,624,980) and Saulsberry, the awardee, submitted the highest price (\$1,788,017). Saulsberry, however, received the highest score for its technical proposal, 96, while Moore and the other offeror that was being considered for award both received 85 points. After reviewing the three proposals, HUD determined that it would be most advantageous to the government to award the contract to Saulsberry despite

Saulsberry's higher price. Moore subsequently submitted its protest to our Office.

Moore first protests that none of the offerors was permitted to attend the opening of initial proposals or BAFOs and that during the procurement the agency refused to provide Moore with the names of the other offerors and the details of their offers.

Federal Acquisition Regulation (FAR) § 14.402-1(a), which requires a bid opening officer to publicly open and, if practical, publicly read all timely received bids, is only applicable to sealed bidding procedures. Here, HUD did not conduct the procurement using sealed bidding procedures. Rather, HUD used negotiation procedures and requested proposals rather than bids. In a negotiated procurement, there is no provision for a public opening. To the contrary, FAR § 15.411(b) specifically requires the contracting officer to safeguard the proposals from unauthorized disclosure. Similarly, FAR § 15.413-1 prohibits the contracting agency from providing information concerning the identity of the offerors or the details of their proposals before a contract award is made.¹ The contracting officer therefore properly did not publicly open the proposals or provide the requested information to Moore.²

In the comments Moore submitted in reply to HUD's report on the protest, for the first time Moore also complained that HUD did not properly secure the proposals before BAFOs were due. Moore asserts that an employee of the awardee informed Moore that Mrs. Saulsberry, the president of the awardee, told the employee that when she was dropping off her BAFO she saw some of the other proposals, including the proposed prices.

In response to Moore's allegation, HUD submitted an affidavit from each member of the evaluation board who affirmed that confidentiality was maintained during the procurement, and sworn statements from the contracting officer and his assistant that they secured both the initial offers and the BAFOs as they were received, and maintained them in a locked file until they were distributed for evaluation. In

¹FAR § 15.413-2 does permit the contracting agency to disclose some information in limited circumstances, where the agency regulations so provide. This provision is not applicable to the present procurement.

²To the extent Moore asserts that the information should be available to Moore under the Freedom of Information Act the issue is not for our consideration. See All Am. Moving and Storage, B-243630; B-243804, July 8, 1991, 91-2 CPD ¶ 32.

addition, HUD submitted an affidavit from Mrs. Saulsberry in which she stated that she did not make any such statement to the employee.

We asked Moore to respond to HUD's affidavits and to submit an affidavit from the person from whom it allegedly received the information concerning HUD's failure to secure the offers. Moore, however, refused to ask the individual to provide an affidavit. Nor did Moore provide any other information demonstrating that the proposals were left unsecured. Accordingly, we have no basis on which to conclude that the proposals were left unsecured and we deny this basis of protest. See Virginia Telecommunications & Sec., Inc., B-247368, May 20, 1992, 92-1 CPD ¶ 456.

Moore next complains that Saulsberry is not capable of performing the contract. In this regard, Moore asserts that Saulsberry has failed to perform many required services and has inadequately performed other services.

To the extent Moore asserts that Saulsberry does not have the capability to perform the contract, Moore's complaint concerns HUD's affirmative determination of Saulsberry's responsibility. That is a matter we do not review unless there is a showing of possible fraud or bad faith on the agency's part or that definitive responsibility criteria in the RFP were misapplied. 4 C.F.R. § 21.3(m)(5) (1992); Mechanical Resources, Inc., B-241403, Jan. 30, 1991, 91-1 CPD ¶ 93. There is no such showing here. Also, that Saulsberry is not performing the contract in accordance with the requirements of the solicitation is a matter of contract administration which is not for review by our Office. See 4 C.F.R. § 21.3(m)(1); United States Elevator Corp., B-241772, Mar. 5, 1991, 91-1 CPD ¶ 245.

Moore also alleges that HUD officials were biased in favor of Saulsberry. To support this allegation, Moore asserts that two members of the source selection board are long time associates of Mrs. Saulsberry. Moore further asserts that Mrs. Saulsberry told some of the other offerors that they need not submit offers because "she had this contract arranged from day [one]." Finally, Moore argues that bias is demonstrated by the fact that HUD awarded the contract to Saulsberry at other than the lowest price and the fact that the agency is not properly monitoring Saulsberry's poor performance.

In response, HUD explains that members of the evaluation board supervised the awardee during the awardee's performance of a prior contract. HUD also asserts that it properly awarded the contract to Saulsberry despite Saulsberry's higher proposed price.

When a protester alleges bias on the part of evaluation officials, the protester must submit convincing proof that contracting officials intended to harm the protester, since contracting officials are presumed to act in good faith. Parameter, Inc., B-241652, Feb. 28, 1991, 91-1 CPD ¶ 229. Here, Moore has not met this standard. First, as discussed below, we find that HUD's decision to award the contract to Saulsberry at a price higher than that offered by Moore was reasonable. Further, Moore has not responded to HUD's statement that the only relationship the members of the evaluation board had with Saulsberry was a business relationship that was established during Saulsberry's performance of a prior contract and that in fact the HUD evaluators had the same relationship with Moore. Nor has Moore provided any evidence to demonstrate that agency evaluators in any way favored Saulsberry or acted on its behalf during the procurement process. In this regard, in our view, Mrs. Saulsberry's statement that she would be awarded the contract on its face is no more than a self-serving statement and is insufficient to establish that the HUD officials favored Saulsberry. Accordingly, since Moore has not provided any concrete evidence to demonstrate agency bias on behalf of Saulsberry, this ground of protest is denied.

Finally, Moore complains that the contract should not have been awarded to Saulsberry at a price higher than that proposed by other offerors, including Moore.

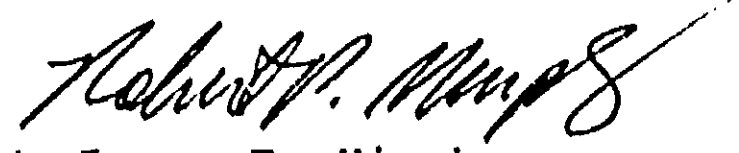
In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. Rather, the agency is free to award to a technically superior, higher priced offeror so long as the result is consistent with the evaluation criteria and the procuring agency has reasonably determined that the technical difference is sufficiently significant to outweigh the price difference. See ACM Envtl. Servs., Inc., B-242064, Mar. 7, 1991, 91-1 CPD ¶ 255; Irwin & Leighton, Inc., B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208.

Here, in reviewing the offers submitted by the three lowest priced offerors, HUD noted that Saulsberry scored higher than the other two offerors in three out of five technical evaluation areas (level of experience in the home repair process; understanding of HUD objectives and required tasks; and staffing, training and equipped office). The evaluation panel determined that based on Saulsberry's advantage in the home repair experience area, an award to Saulsberry provided the government with the greatest assurance of appropriate performance and the least risk of loss of properties. With regard to the second evaluation area, the board also determined that Saulsberry's superior

understanding of HUD's objectives and required tasks provided HUD with a greater degree of confidence in Saulsberry's understanding of this contract and a reduced risk of additional cost to the government. Finally, the board found that Saulsberry's higher rating in staffing, training and equipped office, the third evaluation area, demonstrated that Saulsberry had a greater degree of readiness to assume contract responsibilities and reduced the risk of additional cost. In conclusion, the board determined that Saulsberry provided the government a greater degree of confidence in performing the contract, and lessened the risk of increased cost to the government in such a manner that award to Saulsberry would be most advantageous to the government.

Moore has not challenged any of the agency's findings; instead, Moore simply argues that the award to Saulsberry was not worth the additional cost. Accordingly, we have no basis to question the agency's decision and we deny Moore's protest on this issue.³

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

³To the extent Moore argues that the award decision should have been based on price its protest is untimely since the solicitation clearly provided that the award could be made to other than the lowest priced offeror and Moore did not file its protest until after the closing time for the receipt of proposals. See 4 C.F.R. § 21.2(a)(1); Institute for Wildlife Studies, B-242375, Jan. 18, 1991, 91-1 CPD ¶ 62.